



## STATE OF WISCONSIN Division of Hearings and Appeals

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In the Matter of

La Crosse County Department of Human Services, Petitioner

vs.

██████████ Respondent

DECISION

Case #: FOF - 169201

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Pursuant to petition filed October 6, 2015, under Wis. Admin. Code § HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the La Crosse County Department of Human Services to disqualify ██████████ from receiving FoodShare benefits for a period of one year, a hearing was held on Thursday, January 14, 2016, at 8:15 AM at La Crosse, Wisconsin. The respondent did not appear. She also failed to appear at a hearing scheduled for December 18, 2015, but the matter was rescheduled for the later date when she called the Division of Hearings and Appeals after the December 18, 2015, hearing had already been held.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

La Crosse County Department of Human Services  
300 N. 4th Street  
PO Box 4002  
La Crosse, WI 54601

Respondent:

██████████  
██████████  
██████████

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**ADMINISTRATIVE LAW JUDGE:**

Michael O'Brien  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The respondent (CARES # ██████████) is a resident of La Crosse County who received FoodShare benefits in La Crosse County for a period that included August 1, 2014, through June 30, 2015.

2. The petitioner prepared administrative disqualification hearing notices on October 8, 2015, November 24, 2015, and December 14, 2015, alleging that the respondent failed to report employment that affected FoodShare her benefits.
3. The respondent requested postponement of a hearing scheduled for November 16, 2015, and failed to appear for the hearings scheduled December 18, 2015, and January 14, 2016. She called the Division of Hearings and Appeals after the December 18, 2015, hearing had already been held and asked that it be rescheduled. Her request was granted. She then failed to answer a call made to her at the time the hearing was scheduled to begin on January 14, 2015. She has not provided any good cause for her failure to appear at the January 14 hearing.
4. The respondent began working at [REDACTED] on March 17, 2014. She did not report this on her six-month report form submitted to the FoodShare agency on March 21, 2014, or during her FoodShare review interview conducted on February 20, 2015.
5. Because she did not report her income earned at [REDACTED], the respondent received \$3,856 in FoodShare that she was not entitled to from August 1, 2014, through June 30, 2015.

### **DISCUSSION**

This matter was scheduled three times. In November 2015, the matter was rescheduled at the respondent's request. On December 18, 2015, I called the number associated with her case at the time of the hearing, but received a recording saying that the number was no longer in service. The hearing went ahead with the agency presenting its evidence. After the hearing, the respondent called me and indicated that she still wished to have a hearing. The matter was rescheduled for January 14, 2016, I called the number she provided on that date at the time the hearing was scheduled to begin, but no one answered. I did not take further evidence because the agency presented adequate information during the December 18, 2015, hearing. The respondent has not explained why she missed the latest hearing. Federal rules require hearings to proceed if the respondent cannot be located or fails to appear without good cause. 7 C.F.R. §273.16(e)(4). Because the respondent did not appear or claim a good cause reason for not attending the hearing, I must determine whether she committed an intentional program violation based solely on the evidence presented by the agency.

FoodShare recipients commit an intentional program violation if they intentionally make a false or misleading statement or if they misrepresent, conceal, or withhold facts. If the Department proves by clear and convincing evidence that a recipient intentionally violated the program's rules, she loses their eligibility; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that she failed to report employment she held in 2014 and 2015, which allowed her to receive \$3,856 more in FoodShare that she was not entitled to.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

*Kuehn v. Kuehn*, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

*Wisconsin Jury Instruction – Civil 205* explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The *McCormick* treatise suggests that the standard “could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program’s rules, the evidence must induce a firm conviction that she attempted to purchase FoodShare benefits and that she did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of her voluntary words or acts. *See, John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932).

The agency submitted wage-match records showing that the respondent began working at [REDACTED] on March 17, 2014. Four days later she signed and submitted a six-month report form that failed to indicate this employment. She then met with her worker on February 20, 2015, to review her benefits. She again failed to disclose her employment. The agency’s calculations show that her omission allowed her to receive \$3,856 more in FoodShare than she was entitled to. Because she did not appear at the hearing, there is no reasonable explanation for twice failing to disclose her employment other than that she intentionally violated the program’s rules to receive benefits she was not entitled to.

Based upon the record before me, I find that the agency has established by clear and convincing evidence that the respondent intentionally violated FoodShare program rules, and that this was her first such violation. Therefore, the agency correctly seeks to disqualify her from the FoodShare program for one year.

### **CONCLUSIONS OF LAW**

1. The respondent violated, and intended to violate, the FS program rule specifying that she not misrepresent her eligibility to receive FS benefits that she is not entitled to.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

**NOW, THEREFORE**, it is

**ORDERED**

That the petitioner’s determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify her from the program for one year, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause

for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

## **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,  
Wisconsin, this 29th day of January, 2016

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\sMichael O'Brien  
Administrative Law Judge  
Division of Hearings and Appeals

c: Western Region For Economic Assistance - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email



## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on January 29, 2016.

La Crosse County Department of Human Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@co.la-crosse.wi.us